

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA)	
)	
v.)	Criminal No. 98-15-P-H
)	
MARK A. JOHNSON,)	
)	
Defendant)	

RECOMMENDED DECISION ON MOTION TO SUPPRESS

The defendant is charged with conspiracy to possess cocaine with intent to distribute, in violation of 21 U.S.C. § 846. Three co-defendants — Jon E. Carlson, Sophia Martini and Christopher M. Padmore — stand charged with the same offense and have reached plea agreements with the government (Docket Nos. 17-19). All four were arrested along the Maine Turnpike on April 10, 1998. The defendant seeks the suppression of statements made by him at the arrest scene, as well as of seized physical evidence that includes a razor confiscated from him at the scene, a quantity of crack cocaine discovered incident to a search at the scene, and cash and other items taken from a Westbrook, Maine motel room on the date of the arrest (Docket No. 11). An evidentiary hearing was held on June 11, 1998. I recommend that the following findings of fact be adopted and that the motion to suppress be denied.

I. Proposed Findings of Fact

On February 27, 1998 the Maine Drug Enforcement Agency (“MDEA”) received a telephone call from the Stonington, Connecticut Police Department with a report that two individuals from Rhode Island — Jon Carlson and Sophia Martini — were involved in cocaine trafficking in Portland, Maine. According to the Connecticut authorities, who received their information from a confidential

informant, Carlson and Martini were using an apartment on Winter Street in Portland belonging to one Tammy Pickles to process cocaine into crack cocaine. Ten days later, on March 9, 1998, Carlson was arrested on Peaks Island in Portland in connection with alleged cocaine trafficking. Carlson indicated a desire to cooperate with the MDEA and identified as "L" and "T" his sources of crack cocaine.

On April 10, 1998 the MDEA received information directly from a confidential informant whose reliability the agency had not yet established. The informant stated that individuals from Rhode Island were selling cocaine out of Portland hotel rooms and possibly an apartment in the area of Brackett Street, which is one block west of Winter Street. The informant reported that he had ordered four "eight balls" of crack¹ from these suppliers. Also on April 10, MDEA agent Jonathan Goodman received a telephone call from the manager of the Susse Chalet Motel in Portland, whom Goodman had previously asked to contact him should Carlson ever register there as a guest. The manager indicated on April 10 that Carlson had indeed registered at the Susse Chalet and was making frequent telephone calls to numbers in Portland, including calls to a room at the nearby Super 8 Motel just over the city line in Westbrook.

MDEA agents ascertained that the room being called at the Super 8 Motel was registered to Martini. Goodman and MDEA agent Biff Brady went to the Susse Chalet and learned that the motel had been receiving repeated phone calls for Carlson's room from a woman who identified herself only as "Tammy." The caller was unable to get through because the telephone was busy; the motel staff speculated that it had been left off the hook. Several such calls from this woman arrived while the agents were at the motel; on one occasion the caller left a message to call "Tammy" right away.

¹ An "eight ball" of crack cocaine weighs approximately 3 1/2 grams or 1/8 of an ounce.

The Susse Chalet provided the MDEA agents with a printout of the calls that had been made from Carlson's room on April 8 and 9.² The printout showed, among other things, one phone call to the number of Tammy Pickles' apartment on Winter Street and three phone calls to John Howell, whom the MDEA agents knew to have a record of drug arrests.

At the Susse Chalet, Brady donned a motel maintenance uniform and knocked on Carlson's door while Goodman listened from the adjacent motel room. Martini answered the knock and Brady said he was checking to see if the phone was out of order. Martini, who had the telephone in one hand and a telephone pager in the other, said the phone was fine and that she was speaking to Tammy at that very moment.

At this juncture, roughly 5:00 p.m., Brady and Goodman reconnoitered and decided to pursue a slightly different ruse. Brady called Carlson's room and asked for Carlson, indicating that he wished to purchase some crack cocaine. Martini answered the phone, stated that Carlson was sleeping and said there was "nothing going on" at that point. At approximately 5:45 p.m., the MDEA agents observed Carlson and Martini leave the motel room and walk into the parking lot, where a woman drove up to them. The agents overheard Martini tell the woman that there was "nothing going on" at the time but that she should return at around 9:00 or 10:00 p.m. At this point, Carlson and Martini got into a Ford Aspire with Massachusetts license plates whereupon Goodman undertook to follow the vehicle. He lost sight of the Ford for approximately five minutes, observing it next in the parking lot of the Super 8 Motel, where the defendant got into the car. The Ford next proceeded onto the southbound side of the Maine Turnpike at the nearby Exit 8 and the MDEA agents followed the car as far as the Interstate 95 toll plaza in New Hampshire. They observed that

² The printout was admitted into evidence at the hearing as Government Exhibit 1.

Martini was driving, generally at least 10 miles per hour over the speed limit and making frequent lane changes without signaling.

The MDEA agents were aware that most of the cocaine being sold in Maine came from the Massachusetts cities of Boston, Lawrence and Lowell. Goodman parked his vehicle at the New Hampshire toll plaza and observed the northbound traffic. He was later joined there by MDEA Agent John Dumas in a separate vehicle, who also watched the traffic coming northbound from Massachusetts. Three hours later, at approximately 9:30 p.m., Dumas observed the Ford Aspire traveling northbound although, because it was dark, they could not see who was driving. The two MDEA agents followed the vehicle north into Maine and noted that, in contrast to the car's southbound journey, the driver was scrupulously observing the speed limit and giving a signal prior to changing lanes. In their experience, persons with illegal drugs in their cars tend to adhere to the rules of the road so as to avoid being stopped by police.

Dumas contacted the Maine State Police and arranged to have the Ford pulled over by uniformed troopers as it approached Exit 6A in South Portland. In fact, two state police cruisers positioned themselves to make the stop — one, driven by Trooper Duane Doughty, assigned to deploy “spike” mats if necessary, and the other — containing Sergeant George Denison, Trooper Edmund Furtado and Trooper Corey Huckins — to conduct the actual stop. Huckins, who was driving, pulled the Ford over using his blue police lights. This occurred in darkness shortly after 10:10 p.m. between Exits 6A and 7, slightly farther along the turnpike than originally planned so that Doughty actually ended up behind his colleagues rather than ahead of them. Huckins turned on his cruiser's spotlight to illuminate the scene as the Ford came to a stop.

Furtado approached the driver's side of the vehicle; Huckins the passenger side. Each

trooper carried a service revolver but neither drew his weapon. Denison remained at the cruiser and, invisible to the occupants of the Ford because he was behind the cruiser's spotlight, had a rifle at the ready (although pointed at the ground) to guard against the possible outbreak of gunfire from the Ford. Doughty pulled up in his cruiser soon thereafter. The MDEA agents were also in the vicinity, although they hung back to allow the uniformed officers to make the initial contact.

Approaching the driver, who turned out to be Martini, Furtado observed four people in the car and instructed them to place their hands where he could see them. Furtado instructed Martini to get out of the car and to produce her license and registration. She did so without incident. Furtado then conducted a cursory pat-down search of Martini to assure himself that she was not carrying a weapon. Martini also complied with Furtado's request to allow him to inspect the contents of her pocket book.

Huckins similarly approached and patted down the person sitting in the passenger's seat. Doughty, arriving a minute later to observe Furtado and Huckins with their respective charges, made contact with one of the passengers in the back seat, who turned out to be the defendant. Doughty frisked the defendant without incident. When it became apparent that the stop was proceeding without any threatening behavior by the occupants of the car, Denison stored his rifle in the trunk of Furtado's cruiser and MDEA Agents Goodman, Brady and Dumas approached. Goodman spoke with Martini, asking her where she had been. Martini stated that she had just gone to Boston to pick up "the guy with the dreadlocks," meaning the defendant. Goodman pointed out that he had observed the defendant being picked up by Martini and Carlson earlier in the day at the Super 8 Motel in Westbrook. Martini responded by saying that she had been mistaken and that the trip to Boston was for the purpose of picking up "the other guy," meaning Padmore. Carlson told the agents

that there was no cocaine in the car, that they had stopped him at the “wrong time,” and that he had a shipment of drugs coming the following day. Dumas spoke with the defendant and Padmore, each of whom produced identification upon request. When the defendant was digging his identification out of his pocket, a razor bearing a white residue fell out and onto the ground. Dumas confiscated it. The defendant told Dumas that Padmore was his cousin, but he could not identify Padmore’s last name. Padmore explained that the two were not really relatives but had merely grown up together. The defendant told Dumas that he was in Maine for a vacation and that he was otherwise working in construction. Dumas checked the defendant’s hands but observed no callouses. A cursory search of the car, which was a hatchback with no separate trunk, revealed several pieces of baggage inside.

At this point, the MDEA agents decided to seek further assistance in their investigation in the form of a drug-sniffing dog from the Portland Police Department. They radioed for the dog at 10:29 p.m. and it arrived at 10:41 p.m. The dog alerted for the presence of drugs inside the car. The agents removed all of the baggage and placed it on the ground. At this point, the dog alerted to the presence of drugs only in a duffel bag belonging to Padmore, which the agents proceeded to search. They discovered a bag of what testing later revealed to be crack cocaine rolled up in one leg of a pair of pants. All four defendants were placed under arrest, handcuffed and taken to the Cumberland County Jail for processing. Denison then requested that a tow truck come to the scene to remove the vehicle. By 11:14 p.m., a dispatcher had advised Denison that the tow truck was en route.

The evening of the arrest was a cool one and, thus, at least some of the defendants were permitted to sit in one of the state police cruisers periodically prior to their arrest in order to get warm. Otherwise, they were permitted to mill about at the scene until the discovery of the drugs and the decision to make arrests.

II. Discussion

Under *Terry v. Ohio*, 392 U.S. 1 (1968), and its progeny, the Fourth Amendment right to be free from illegal search and seizure is not violated when the authorities act pursuant to a “reasonable and articulable suspicion” and “make a brief stop or ‘seizure’ of an individual to investigate suspected past or present criminal activity.” *United States v. McCarthy*, 77 F.3d 522, 529 (1st Cir. 1996) (citations omitted). “The relevant question in these cases is not whether the police had probable cause to act, but instead whether the actions taken were reasonable under the circumstances.” *Id.* (citation omitted). In other words, the court must determine “whether the actions undertaken by the officer[s] following the stop were reasonably responsive to the circumstances justifying the stop in the first place, as augmented by information gleaned by the officer[s] during the stop.” *United States v. Sowers*, 136 F.3d 24, 27 (1st Cir. 1998) (citations omitted), *petition for cert. filed* (May 28, 1998) (No. 97-9222). To conduct the inquiry, the court must “balance[] the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion.” *Id.* (citations omitted).

There can be no question in this case that the State Police and MDEA had a reasonable articulable suspicion sufficient to warrant a *Terry* stop on the Maine Turnpike. They did not know for sure that Carlson, Martini and the defendant had traveled from Maine to Massachusetts and back again to bring a shipment of cocaine into Maine, but the circumstances were more than sufficient to trigger such a suspicion in a reasonable officer. This is so even though, as the defendant pointed out at hearing, it was possible that lawful explanations existed for the unusual behavior observed by the MDEA agents and even though the authorities could have pursued a different investigative strategy

(such as obtaining a warrant to search the motel rooms while the defendants' vehicle was away on its alleged drug-buying voyage). Everything that occurred prior to the stop was consistent with a trip designed to bring cocaine into Maine.

Having determined that the stop was justified at its inception, the court must next decide "whether the action taken was reasonably related in scope to the circumstances justifying the interference in the first place." *McCarthy*, 77 F.3d at 530 (citations omitted). Some scenarios that begin as *Terry* stops can escalate into *de facto* arrests. *See Sowers*, 136 F.3d at 28. "In assaying such a claim, a court must weigh, among other factors, the length of the detention, the restrictions placed on an individual's personal movement, the force (if any) that was exerted, the information conveyed to the detainee, and the severity of the intrusion." *Id.*

This was not a routine traffic stop. Within minutes of the vehicle pulling over, four state troopers and three MDEA agents were at the scene. The occupants of the car were ordered to place their hands where they could be seen. The supervising State Police officer wielded a rifle, although this was not visible to the occupants of the stopped vehicle. The record does not permit a precise determination of how much time elapsed between the initial stop and the arrests, although the evidence suggests the entire process took less than an hour. It is apparent that the defendant and his compatriots, although not formally placed under arrest prior to the detection of the cocaine, were not free to leave at any point after their car was pulled over.

On the other hand, none of the officers and agents who interviewed the occupants of the car pulled out their weapons. Their initial concern, giving rise to the command to keep hands where they could be seen, was justified in light of experience suggesting that persons trafficking in cocaine are often armed and dangerous. The detainees were allowed some freedom of movement while the

investigation proceeded. In contrast to *McCarthy* — where a defendant was ordered to sit in a police cruiser during a lawful *Terry* stop that lasted in excess of 75 minutes, *McCarthy*, 77 F.3d at 525, 529 — here at least some defendants were invited into one of the cruisers as a courtesy because it was a cool night and the police vehicles were warm.

This case is similar to *McCarthy* in that the length of the detention in question “arose not because the officers engaged in dilatory tactics, but, instead, because their investigative efforts, though reasonable under the circumstances, failed to dispel the suspicion that gave rise to the stop.” *Id.* at 531. Indeed, the contradictory and evasive answers the investigators received at the scene only heightened the reasonable suspicion that the hypothesis originally formed by the MDEA agents as they left the Susse Chalet earlier in the evening was correct. In *Sowers*, the First Circuit declined to disturb this court’s determination that a *Terry* stop along the Maine Turnpike at approximately the same hour as the stop at issue here was not a *de facto* arrest even though “at least thirty minutes elapsed between the time of the stop and the discovery of what appeared to be contraband.” *Sowers*, 136 F.3d at 28; *see also United States v. Zapata*, 18 F.3d 971, 975 (1st Cir. 1994) (investigatory stop involving several officers not a *de facto* arrest where officers were “measured,” “polite” and “not bellicose”); *United States v. Quinn*, 815 F.2d 153, 157 (1st Cir. 1987) (similar, with added presence of drug-sniffing dog). The facts adduced at the suppression hearing in this case justify precisely the same conclusion.³

³ A Ninth Circuit case cited by the defendant both at hearing and in his written memorandum, *Washington v. Lambert*, 98 F.3d 1181 (9th Cir. 1996), is thoroughly distinguishable. In *Washington*, a civil case arising under 42 U.S.C. § 1983, police targeted two men purely because they were African-American, with one being short and the other tall (and thus resembling, to that very limited extent, two legitimate suspects), ordered them out of their vehicle at gunpoint, handcuffed them and placed them in separate police vehicles. *Id.* at 1183, 1184. The court concluded that “any reasonable juror would be compelled to find on these facts that the stop was an

Because I conclude that the State Police and MDEA agents effected a lawful *Terry* stop, it is not necessary to address the government's alternative theory concerning the existence of probable cause to arrest Carlson and Martini. *See, e.g., United States v. Bizier*, 111 F.3d 214, 220 (1st Cir. 1997) (roadside search incident to arrest for drug offenses justified based on prior drug investigation); *United States v. Doward*, 41 F.3d 789, 791-94 (1st Cir. 1994) (sustaining, as valid search incident to arrest, search of hatchback area of car). Nor is it necessary to evaluate the government's position that the defendant lacked standing to challenge the search of what turned out to be Padmore's baggage. Finally, I do not address myself to the evidence seized from the motel room because the parties indicated at hearing that the defendant's sole basis for seeking the suppression of this evidence is a fruit-of-the-poisonous-tree theory relating to the lawfulness of the Maine Turnpike stop.

III. Conclusion

For the foregoing reasons, I recommend that the defendant's motion to suppress be DENIED.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

arrest" and not a *Terry* stop. *Id.* at 1192. Here, although the defendant and Padmore are African-American, the investigatory stop at issue involved neither the same level of intrusiveness nor anything that could be construed as racial stereotyping.

Dated this 18th day of June, 1998.

David M. Cohen
United States Magistrate Judge